STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM D. CLEMENS,

Defendant-Appellant.

UNPUBLISHED
October 28, 2003

No. 238177
Wayne Circuit Court
LC No. 01-003306-01

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for resisting and obstructing a police officer, MCL 750.479, and furnishing false information while being detained for a violation of the Michigan Motor Vehicle Code, MCL 257.324. Defendant was sentenced to twenty-four to thirty-six months in prison for the resisting and obstructing conviction and sixty days in jail for the furnishing false information conviction. We affirm.

Defendant argues that trial counsel was ineffective for failing to request an instruction for attempted resisting and obstructing a police officer. We disagree.

Defendant has not fully preserved this issue for review because he did not move for a new trial or evidentiary hearing.[1] *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Consequently, this Court's review is limited to mistakes apparent on the record. *Id*. at 659. Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error, and review the constitutional question de novo. *Id*. To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

694 (2000). Moreover, reversal is not warranted unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *LeBlanc*, *supra* at 578. See also, *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994), and *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, so the defendant assumes a heavy burden of proving otherwise. *LeBlanc*, *supra; Rodgers*, *supra*.

Defendant claims that counsel was ineffective because he did not request that the judge give an instruction for attempt as a necessarily included lesser offense. There are two types of lesser included offenses: necessarily included lesser offenses and cognate lesser offenses. *People v Mendoza*, 468 Mich 527, 532; 664 NW2d 685 (2003). A necessarily included lesser offense is one where the elements of the lesser offense are completely included in the greater offense. *Id*., at n 3, citing *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). A cognate lesser offense is one that shares several elements with the greater offense, and is of the same class or category, but it contains elements not found in the greater offense. *Mendoza, supra* at 532 n 4, citing *Cornell, supra* at 344.

In *Cornell* our Supreme Court held that the trial judge need only instruct the jury on a necessarily included lesser offense if there is a disputed factual element in the greater offense that is not included in the lesser offense and a rational view of the evidence would support it. *Cornell, supra* at 357. Under MCL 768.32 a court is not permitted to instruct on a cognate lesser offense. *Id.* at 354-355. In so holding, the Court examined MCL 768.32(1), which provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, *or of an attempt to commit that offense*. [Emphasis added.]

But the Court expressly declined to examine attempt because it was not at issue. *Cornell, supra* at 354 n 7.

An attempt instruction is proper under the same test required for a necessarily lesser included offense instruction because the statute interpreted in *Cornell* allows the trier of fact to find the accused person guilty of an attempt to commit the charged offense. But when the requested instruction is analyzed under the test for a necessarily included lesser offense instruction, it is not appropriate. If a requested instruction is for a necessarily included lesser offense, the trial court must consider whether an element found in the greater offense but not the lesser offense is factually disputed, and a rational view of the evidence would support it. *Cornell, supra* at 357. In other words, "'a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and the greater offenses.'" *Id.* at 356, quoting *Sansone v United States,* 380 US 343, 349-350; 85 S Ct 1004; 13 L Ed 2d 882 (1965).

The charged offense and an attempt to commit it differ in that the charged offense is the completed crime and an attempt is merely an act toward the commission of the crime coupled with the intent that the crime be completed. MCL 750.92; *People v Thousand*, 465 Mich 149,

163-164; 613 NW2d 694 (2001). In this case, there is no dispute that defendant, in fact, committed the charged offense of resisting and obstructing a police officer. The evidence presented at trial, including defendant's refusing to be handcuffed, kicking out windows, and wrestling for the officers' guns, reveals that defendant went beyond a mere act toward resisting and obstructing. He completed the commission of the crime.

Defendant's trial counsel did not err in failing to ask for an instruction on attempted resisting and obstructing an officer because it is not supported by a rational view of the evidence. *People v Reese*, 466 Mich 440, 446, 448; 647 NW2d 498 (2002). The evidence only supports a completed offense of resisting and obstructing a police officer. The court is correct to omit requested jury instructions on a lesser offense where the evidence only tends to prove the greater. *Cornell, supra*. Therefore, counsel did not err in failing to request the jury instruction for attempted resisting and obstructing a police officer.

Further, this Court will not second-guess matters of trial strategy. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999). It is probable that counsel determined as a matter of trial strategy that he should not request an instruction on the lesser offense of attempt because if the jury did not believe the prosecutor's version of the events, it would simply acquit defendant of the charged offense. Failure of trial strategy does not necessitate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not shown that had counsel requested and received an instruction on the lesser offense of attempt it is reasonably probable that the result of the proceedings would have been different. *Toma, supra* at 302-303. Defendant has failed to overcome the presumption that counsel rendered effective assistance; his trial was fair and the result reliable. *LeBlanc, supra* at 578.

We affirm.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey